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No. 532

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, APPELLANT

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, JOHN M. HANCOCK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (R. 72) is not reported.

JURISDICTION

The final judgments of the district court were entered on August 29, 1952 (R. 75–7, 78–9, 81–2). The petition for appeal was presented and allowed on October 27, 1952 (R. 94, 95). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

Probable jurisdiction was noted on February 2, 1953 (R. 104).

QUESTIONS PRESENTED

The United States brought three actions under Section 15 of the Clayton Act alleging that interlocking directorships held by the same individual in each of three sets of two competing corporations were in violation of Section 8 of that Act. The complaints named both the individual and the companies as defendants. After the suits had been filed, the individual gave up his position as a director of one of the two competing companies involved in each case, and stated that he had "no intention" of resuming the terminated directorships. All the defendants then moved to dismiss the cases on the ground, *inter alia*, that they were moot. The district court, treating these motions as motions for summary judgment, granted them upon the ground that the controversy in each case was moot, and entered orders of dismissal.

The questions are:

1. Whether discontinuance of the interlocking directorships, after the actions had been instituted, rendered the cases moot.

2. Whether the district court erred in holding, on the motions to dismiss, that the plaintiff was not entitled to any injunctive relief.

3. Whether district courts, as well as the Federal Trade Commission, have jurisdiction of suits to enforce Section 8 of the Clayton Act and

whether corporations can be made parties defendant in such suits.

STATUTE INVOLVED

Sections 1, 8, 11 and 15 of the Act of October 15, 1914, 38 Stat. 730, as amended, commonly known as the Clayton Act, provide in part as follows:

> Sec. 1. * * *
>
> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations * * *. [15 U. S. C. 12.]
>
> * * * * * *
>
> Sec. 8. * * *
>
> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. * * * [15 U. S. C. 19.]
>
> * * * * * *
>
> Sec. 11. Authority to enforce compliance with sections two, three, seven, and eight of this Act by the persons respectively subject thereto is hereby vested * * * in the Federal Trade Commission where ap-

plicable to all other character of commerce to be exercised as follows:

Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven, and eight of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of hearing * * *. * * * if upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served upon such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. * * * [15 U. S. C., Supp. V, 21.]

* * * * *

Sec. 15. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States * * * to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying

that such violation shall be enjoined or otherwise prohibited. * * * Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof. [15 U. S. C. 25.]

STATEMENT

On February 27, 1952, the United States filed three suits under Section 15 of the Clayton Act alleging that the interlocking directorships held by John M. Hancock in (1) W. T. Grant Company and S. H. Kress & Company, (2) The Kroger Company and Jewel Tea Company, and (3) Sears, Roebuck & Company and Bond Stores, Incorporated, respectively, were in violation of Section 8 of that Act (R. 1–4, 25–9, 46–9). The suits were instituted following almost five years of discussion between Hancock and the Department of Justice relating to these interlocking directorships (R. 17, 20–1, 40, 61, 73).

The complaints in the three cases are substantially identical. Each complaint alleged that for many years Hancock had been a director at the same time of the two defendant companies, each of which had permitted him to serve as a director while also a director of the other company (R. 3, 27–8, 48). It was further alleged that each com-

pany was engaged in interstate commerce and had capital, surplus and undivided profits aggregating more than $1,000,000 (R. 1-2, 26, 46-47), and that the two companies, by virtue of their business and location of operation, had been and were competitors so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws (R. 3, 27, 48).

Each complaint prayed, by way of relief, that Hancock be ordered to resign his directorship in one or both of the competing companies, as the court shall direct; that the company or companies from which Hancock should be ordered to resign be enjoined from permitting him to be elected or to serve as a director in the future; that Hancock be enjoined from serving as a director in any two or more competing corporations engaged in interstate commerce, any one of which has capital, surplus and undivided profits aggregating more than $1,000,000; that each company be enjoined from permitting any person to serve as a director if he is at the same time a director of a competitor corporation engaged in interstate commerce; and that the defendants be adjudged to have violated Section 8 of the Clayton Act (R. 3-4, 28-9, 49).

Shortly after the suits had been filed, Hancock announced that he would not stand for reelection as a director of Kroger (R. 61, 69-70), and resigned as a director of Kress and Bond (R. 17,

21–2, 39–41). All of the defendants then moved to dismiss the complaints on the ground, *inter alia*, that the cases were moot (R. 12, 15, 19, 38, 59, 67). In supporting affidavits (R. 20, 39, 61), Hancock stated that he had terminated his relationship with each of the three companies just mentioned—

> not because I believed that Section 8 of the Clayton Act is applicable, but because I did not believe I was justified in involving these two corporations in the trouble and expense which would be required by a test of the action.

Hancock further stated in each affidavit that he had "no intention of ever going back" on the board of the company from which he had resigned as long as he remained a director of the competing company. He also averred (*ibid.*):

> It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I never would do.

Hancock's affidavits also stated that the Department of Justice had questioned the legality of his directorships in June 1947, and that during the intervening period of almost five years before institution of the present actions he had had numer-

ous conferences with officials of the Department and had submitted to them numerous memoranda of facts and law (R. 20–1, 40, 61). And it appears from affidavits filed by officers of certain defendant corporations[1] that during this long period Hancock did not inform them that the Department questioned the legality of the interlocking directorships involved in the present case.

The district court (Conger, D. J.), treating each motion to dismiss as a motion for summary judgment (R. 72), granted the motion upon the ground that the "controversy is moot" and entered judgment dismissing the complaint (R. 76–7, 79, 82). The court in its opinion stated that it did not think that "there is the slightest threat that the defendants will attempt any future activity in violation of Section 8" (R. 73).[2] The court also stated that it failed to see "what right the plaintiff has to a direction that Hancock resign from all the companies," and that its de-

[1] Grant (R. 15); Bond (R. 43), Jewel Tea (R. 63), Kroger (R. 68–9). See also Kress (R. 17).

[2] The court stated (R. 73) that it was inclined to follow the unreported ruling made in December 1935 by the district court in *United States* v. *Mather* (N. D. Ohio, Civil Action No. 5153). That case was an action brought by the United States under Section 8 of the Clayton Act against several individual directors and the corporations in which they held interlocking directorships. After certain of the individual defendants had resigned as directors of one of the two competing companies, the district court dismissed the action as to them and the affected corporations as moot.

cision "would not be a bar to a new suit in case possible violations arise in the future" (R. 74).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In dismissing the cases as moot.

2. In failing to grant the relief prayed for in the complaint.

SUMMARY OF ARGUMENT

I. Abandonment of allegedly illegal practices after the Government has filed suit to enjoin them does not render a case moot. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290.

II. The district court's conclusion that there was not the "slightest threat" of future violations of the statute by the defendants was not warranted by the facts before it on the motions to dismiss. These facts were that Hancock did not resign until after suit had been instituted, that he continued to assert the legality of the interlocking directorships, that he held such directorships in at least three sets of companies, and that he failed to make any commitment relating to assumption of similar interlocking relationships in the future. Even if these facts are taken as warranting the presumption that Hancock would not resume the particular resigned directorships,

they plainly do not show or tend to show that he would not assume other interlocking relationships of the same character.

Section 15 of the Clayton Act, which is the counterpart of Section 4 of the Sherman Act, empowers the district court to grant whatever relief is necessary to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88. The district court's power goes beyond ending the "specific" illegal positions which Hancock has been holding (*International Salt Co.* v. *United States*, 332 U. S. 392, 401), and it embraces prohibition of acts of the "same type or class * * * found to have been committed" (*National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435, 436). This Court repeatedly has sanctioned relief in Sherman Act cases which is far more sweeping than that requested by the Government in the instant case.

III. The Federal Trade Commission does not have exclusive jurisdiction to enforce Section 8 of the Clayton Act, and district courts have "concurrent jurisdiction" to enforce this and other sections of the Act. *United States Alkali Export Association* v. *United States*, 325 U. S. 196, 208.

The order of the district court could be directed against the corporate defendants as well as against Hancock. Section 11 of the Act author-

izes the Federal Trade Commission to require a corporation to rid itself of a director chosen contrary to the provisions of Section 8, and the broad power given district courts to "prevent and restrain" violations of Section 8 certainly confers upon the courts no narrower authority as to relief than the Commission may exercise. Obviously those against whom the court's order may be directed are proper parties defendant.

ARGUMENT

I

DISCONTINUANCE OF THE INTERLOCKING DIRECTORSHIPS AFTER SUITS HAD BEEN FILED DID NOT RENDER THE CASES MOOT

"Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." *Walling* v. *Helmerich & Payne,* 323 U. S. 37, 43. As the Court further said in that case (*ibid.*), where the defendant "has consistently urged the validity" of the conduct which he has discontinued and would be free to resume it if no judicial restraint were imposed, there is "an actual controversy, and adverse interests" (*Lord* v. *Veazie,* 8 How. 251, 255), with a "subject-matter on which the judgment of the court can operate" (*Ex parte Baez,* 177 U. S. 378, 390). Where, however, continuance of the illegal conduct has been rendered impossible "by force of events beyond their [de-

fendants'] control," such as the outbreak of war, there is no "existing controversy" and the case is moot, notwithstanding the possibility that the combination might be recreated following termination of war. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475, 477. Cf. *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113.

This Court has consistently held that, absent such special circumstances, mere abandonment of the challenged practices—particularly after suit to enjoin them has been filed—does not put an end to the controversy. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307–310; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 42–43. Cf. *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, 567–568. An action to enjoin an order of the Interstate Commerce Commission has been held not moot even though the order had expired, where the order "was capable of repetition by the commission and was a matter of public interest." *McGrain* v. *Daugherty*, 273 U. S. 135, 182; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452. Similarly, a suit to enforce a National Labor Relations Board order prohibiting a union from

striking to compel persons not to deal with a nonunion supplier, is not rendered moot by completion of the project out of which the strike arose, where the "underlying dispute" between the union and the supplier still remained and the strike was "merely a sample of what might be repeated elsewhere if not prohibited." *Local 74, United Carpenters & Joiners* v. *National Labor Relations Board*, 341 U. S. 707, 715. As long as the "issue as to whether future violations should be enjoined" is still before the court, the case is not moot. *Porter* v. *Lee*, 328 U. S. 246, 252.

This is not a case where a court, after trial on the merits, has determined that there is not sufficient likelihood of repetition of the illegal practices to require an injunction against future violations. Cf. *United States* v. *Hart-Carter Co.*, 63 F. Supp. 982 (D. Minn.). In such a situation the trial court, if it finds "a bona fide intention to comply with the law," may be justified in denying injunctive relief. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 421. In the instant case the court below, without having received any evidence relating to the violations charged or the need for the requested relief, held that each case was rendered moot by reason of Hancock's resignation from one of the two competing companies and his disclaimer of intention to resume the resigned directorship.

II

THE DISTRICT COURT ERRED IN HOLDING THAT THE PLAINTIFF WAS NOT ENTITLED TO ANY INJUNCTIVE RELIEF

A. THE FACTS BEFORE THE DISTRICT COURT SHOWED THE NEED FOR INJUNCTIVE RELIEF

The district court's determination that the cases were moot appears to be grounded on its conclusion that there was not "the slightest threat that the defendants will attempt any future activity in violation of Section 8." We have already shown that the cases were not moot in a jurisdictional sense (*supra*, pp. 11–13), and we submit that, on the facts which were before the district court, it was error to deny all injunctive relief.

The sole facts tending to support the district court's conclusion that there was not the "slightest threat" of future violation of the statute by the defendants are Hancock's resignations and his affidavits that he had no intention of resuming the resigned directorships. But certain other facts established by the pleadings and affidavits indicated a real and present danger of further violations of the statute, so that there remained a live controversy which required injunctive relief. Established facts pointing in this direction are:

1. Hancock's interlocking directorships involved three separate and distinct violations of Section 8 (*supra*, p. 5).[3]

[3] On the motions to dismiss, the illegality of Hancock's interlocking directorships must be assumed.

2. Although the Government had been endeavoring to procure the termination of Hancock's interlocking directorships for almost five years, Hancock did not resign until after the Government had instituted this litigation (*supra*, pp. 6, 7).[4]

3. Hancock, although resigning the directorships, averred that he was advised by counsel that "it is doubtful whether Section 8 of the Clayton Act is applicable to my concurrent directorship," and that he had resigned, not because he believed Section 8 to be applicable, but because he did not wish to involve the affected corporations in the "trouble and expense" which would be required by a test of the action (R. 20, 39, 61).[5]

[4] In 1947 the Department of Justice undertook to procure through informal discussions termination of a number of interlocking directorships which it believed violated Section 8 of the Clayton Act. Most of the affected directors resigned after the Government's views had been brought to their attention. Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale Law Journal 1266, 1270–1271. Apart from the present case, there is only one other pending suit by the United States to enforce Section 8 (*United States* v. *Sears, Roebuck & Co.*, S. D. N. Y., Civil Action No. 73-293), which involves directorships held by Sidney G. Weinberg in Sears, Roebuck and the Goodrich Company.

[5] In addition to his directorships in the three sets of competing companies involved in these cases, Hancock also was a director of at least 14 other companies when these suits were filed. Poor's 1952 Register of Directors and Executives, p. 2191. Hancock, a partner in the investment banking firm of Lehman Brothers, testified in 1940 that "[T]he traditional practice of the firm" has been to ask for repre-

4. Hancock's affidavits did not state that he would not enter into similar interlocking relationships in the future (R. 20–2, 39–41, 60–3).

5. The defendant companies gave no assurance that they would not in the future elect directors who also were directors of competing companies.

Abandonment of alleged illegal practices *before* suit is instituted sometimes indicates the unlikelihood of their repetition. Cf. *United States* v. *United States Steel Corporation*, 251 U. S. 417, 445; *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64, 84. Abandonment, when not prompted by expectation or dread of suit, may show a change of heart by the violator and reasonable probability that the old ways will not be continued. But there is little if any basis for such inference where, as here, abandonment comes only after actual institution of litigation and the defendant continues to assert the legality of the abandoned practices.[6] In such circumstances, Hancock's resignations are "no assurance" that if he "could shake respondent's [appellant's] hand from its [his] shoulder, [he] would not continue its [his] former course."

sentation on the boards of directors of companies whose financing it has handled. Hearings Before the Temporary National Economic Committee, 76th Cong., 3d Sess., Part 24, p. 12400. Whether Lehman Brothers still follows that practice would be an appropriate subject of inquiry at a hearing on the need for injunctive relief.

[6] Cf. *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U. S. 202.

Sears, Roebuck & Co. v. *Federal Trade Commission*, 258 Fed. 307, 310 (C. A. 7).

In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. A. 2), the defendant was found to have maintained, prior to 1933, such a narrow margin between its price for ingot and its price for rolled sheets as to effect a "price squeeze" upon competitors engaged in making rolled sheets from ingot purchased from the defendant. 148 F. 2d at pp. 437–438. By its decision rendered in 1945 the court of appeals directed the district court to enjoin such a price squeeze, discontinued twelve years earlier. *Id.*, at p. 447. The court said (*ibid.*):

> It is enough here to say that, since "Alcoa" abandoned the "squeeze" only after it became aware that it was under investigation, it is in no position now to complain of whatever stigma there may be in an injunction; in such a setting there is no place for sensibilities; nor should lapse of time secure immunity.

Even if it be assumed that Hancock will not resume the particular resigned directorships, the facts indicate that he would not hesitate to assume other interlocking relationships of the same character. Hancock's failure to make any commitment going beyond the particular violations charged in the present cases is significant in view of the large number of directorships which he

holds and their relation to his partnership in Lehman Brothers.[7] And his stated intention not to resume the resigned directorships "will not be a counterweight to the protection of which the plaintiff has shown he was once in need, and which he will need again, should the defendant change his mind." *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221, 222 (C. A. 2). Cf. *Sears, Roebuck & Co.* v. *Federal Trade Commisison*, 258 Fed. 307, 310 (C. A. 7).

In *Walling* v. *Helmerich & Payne*, 323 U. S. 37, the Administrator of the Wage and Hour Division of the Department of Labor had filed a complaint which, in part, sought to enjoin an employer from making further use of certain so-called "split-day" employment contracts alleged to violate the Fair Labor Standards Act of 1938. Two months after the complaint was filed, but before trial, the employer discontinued the use of these contracts and substituted different compensation plans. The district court denied an injunction on the merits insofar as the split-day contracts were concerned, and the court of appeals affirmed on that basis. This Court likewise ruling on the merits, held the split-day contracts illegal, and reversed the court below with directions to remand to the district court for further proceedings in conformity with the

[7] See note 5, *supra*, p. 15.

Court's opinion. 323 U. S. at p. 43. The Court said (*ibid.*):

> Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made.

In the present case Hancock has likewise "consistently urged the validity" of his interlocking directorships and presumably would be free to resume them (or other illegal directorships) "were not some effective restraint made." The facts before the district court disclosed no exceptional circumstances which would take this case out of the general rule that mere abandonment does not put an end to the controversy between the parties or establish absence of need for injunctive relief. Hancock relinquished his directorships only after suit had been instituted; he expressly has declined to acknowledge their illegality; he has been party to three separate and distinct violations of Section 8; and he has made no commitment to abstain in the future from similarly illegal interlocking relationships.

The *Helmerich* case answers appellee Kroger's contention that there is no need for injunctive relief after abandonment unless there are "intricate patterns of business practices and subtle relationships of an inherently continuing nature" (Kroger's Statement Opposing Jurisdiction,

p. 8). The violations involved in the *Helmerich* case were based on a particular type of contract and were just as simple in character as Hancock's interlocking directorships. Cf. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332.

In a Clayton Act case, as in a Sherman Act case, the remedy against the wrongdoer must be "as effective and fair as possible in preventing continued or future violations of the Antitrust Act in the light of the facts of the particular case." *United States* v. *National Lead Co.*, 332 U. S. 319, 335. In the light of Hancock's prior actions, merely prohibiting him from repeating the specific violations here involved would not be sufficient. Cf. *International Salt Co.* v. *United States*, 332 U. S. 392, 401.

The district court implicitly recognized that future violations were a definite possibility since it stated that its dismissal of the suits "would not be a bar to a new suit in case possible violations arise in the future" (R. 74). But the Government, in enforcing the Clayton Act, should not be put in the position of being compelled to institute a series of law suits against a transgressor each time he commits a new violation. Injunctions against future violations are issued to avoid just such a multiplicity of suits.

B. THE DISTRICT COURT HAS THE POWER TO GRANT THE INJUNCTIVE RELIEF REQUESTED BY THE GOVERNMENT

Section 15 of the Clayton Act, under which these suits were brought, was copied from, and

was intended to give the district courts the same broad enforcement powers as, Section 4 of the Sherman Act. H. Rep. No. 627, 63d Cong., 2d Sess., p. 21. The section vests the district courts with plenary power to "prevent and restrain" violations of the Clayton Act, and it authorizes the Government to pray that violations of the Act be enjoined "or otherwise prohibited." The section plainly empowers the court to grant whatever relief is necessary to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88. "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise" of the court's jurisdiction to "enforce compliance with the Act." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398. "And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.*

This Court has consistently sustained the power of the district courts under Section 4 of the Sherman Act to grant such relief as is necessary to prevent violations of the antitrust laws and to protect the public against their repetition. The power has been held to embrace such relief as dissolution of companies found to have mo-

nopolized interstate commerce (*United States* v. *Standard Oil Co.*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106), divestiture or divorcement of segments of a business where combined operation had resulted in monopolization or restraint of trade (*United States* v. *National Lead Co.*, 332 U. S. 319; *United States* v. *Paramount Pictures*, 334 U. S. 131), prohibition of the voting of stock acquired pursuant to a conspiracy in restraint of trade (*Northern Securities Co.* v. *United States*, 193 U. S. 197), compulsory licensing of patents used to effectuate restraints of trade (*Hartford-Empire Co.* v. *United States*, 323 U. S. 386), furnishing technical know-how to licensees (*United States* v. *National Lead Co.*, *supra*), and compulsory offers to sell patented devices when leasing practices had been employed to eliminate competition (*Besser Mfg. Co.* v. *United States*, 343 U. S. 444).

Since Hancock may well assume other illegal directorships in the future, there can be no doubt as to the power of the court to enjoin him from so doing. Its remedial powers extend beyond merely ending the "specific illegal practices" of the past, i. e., the particular directorships presently involved. *International Salt Co.* v. *United States*, 332 U. S. 392, 401. "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has

found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. * * * when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435, 436. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 474.

For the same reasons, the court, in exercising its power to issue an injunction against the defendant corporations as well as Hancock (*infra*, pp. 24–26), may prohibit the corporations from permitting not only the "specific" illegal directorships involved in this case, but also other illegal directorships of a like character; i. e., "other related unlawful acts."

III

APPELLEES' OTHER CONTENTIONS, NOT PASSED UPON BY THE DISTRICT COURT, DO NOT CONSTITUTE GROUNDS FOR DISMISSING THE ACTION

The district court, having determined that the controversy in each case was moot, did not pass upon certain other grounds for dismissal set forth in defendants' motions to dismiss (R. 72). One such ground, included in all the motions to dismiss, was that the district court had no jurisdiction to entertain the suits, but that jurisdiction

to enforce Section 8 of the Clayton Act is vested exclusively in the Federal Trade Commission (R. 12, 15–6, 19, 38, 59–60, 67). The contrary is, however, firmly established. The Clayton Act provides for a "dual system of enforcement" (*Standard Oil Co.* v. *United States,* 337 U. S. 293, 310, note 13), under which Congress has "explicitly provided" for "concurrent [enforcement] jurisdiction" in the Commission and the courts (*United States Alkali Export Association* v. *United States,* 325 U. S. 196, 208). See also *International Business Machines Corp.* v. *United States,* 298 U. S. 131.

The corporate defendants also moved to dismiss upon the ground that Section 8 of the Clayton Act is addressed only to the individual who illegally holds interlocking directorships, and not to the corporations of which he is a director (R. 12, 16, 38, 60, 67).[3] The contention is that the prohibition in Section 8 that "no person shall at the same time be a director in any two or more corporations" means that only a director can

[3] Three of the corporate defendants (W. T. Grant Company, Sears, Roebuck and Company, and Jewel Tea Company) also moved to dismiss upon the ground that since Hancock was not a director of a competing company when elected to their respective boards, they cannot be deemed to have violated the Act (R. 12, 38, 60). The short answer to this contention is that each of these companies continued to reelect Hancock to its board long after he had been elected a director of a competitor. Under the Act, their knowledge of his second directorship is immaterial.

violate the section. In our view this contention—with which we disagree—is beside the point. For whether or not the interlocked corporations are technically violators of Section 8, we show below that the district court has the power to direct its remedial order against them. And if the order of the district court could be directed against the corporate appellees, they clearly were proper parties defendant. Federal Rules of Civil Procedure, Rules 19 (a), 20 (a); *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 190–191.

Section 11 authorizes the Federal Trade Commission to issue a cease and desist order against any person found to have violated Section 8 "requiring such person to * * * rid itself of the directors chosen contrary to the provisions of" that section. Section 1 of the Act defines person to include corporation. Plainly, therefore, the Commission is authorized to issue an order requiring termination of an interlocking relationship against the corporation as well as against the offending director.

It would militate against the effectiveness of the concurrent enforcement of Section 8 provided for by Congress (see *supra*, p. 24) if Commission orders could run against both the corporation and the director, but court orders against only the latter. The plenary power granted to the

district courts "to prevent and restrain violations of this Act" negatives the view that Congress intended thus to restrict the court's "inherent equitable powers" when dealing with violations of the Clayton Act. If effective relief required that the remedial order be directed against the interlocked companies, the court would have power to enter it (see *supra*, p. 23).

The fact that Section 11 specifically empowers the Trade Commission to direct its order against the corporation, while Section 15 is phrased in more general terms, does not manifest an intention to deprive the district courts of that power. It is to be presumed that Congress intended to make the reach of the administrative agency's power as broad as that of the district court.

CONCLUSION

For the foregoing reasons, the judgments of the district court should be reversed and the cases remanded for further proceedings.

Respectfully submitted,

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